United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 22, 2006

TO : Celeste J, Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Local 215, District Council
1707, AFSCME (NYANA)
Case 2-CB-19748

This Section 8(b)(1)(A), (2) & (3) case was resubmitted for advice as to whether the Union's claim, now rejected by an arbitrator, that the Employer be required to apply the terms of the parties' contract to the employees at a newly-acquired Employer facility is unlawful. By our earlier memorandum dated July 23, 2004, we directed the Region to hold the case in abeyance pending the close of the arbitration proceeding. We now conclude that the charge should be dismissed, absent withdrawal, on the view that the claim neither was baseless and retaliatory nor sought an unlawful objective.

The background and facts are laid out in our prior memo. Briefly, New York Association for New Americans (NYANA) (the Employer) is a non-profit organization which provides resettlement services to refugees and immigrants. For many years, NYANA has recognized the Union as the representative of "all the employees" in its resettlement programs at multiple locations in New York City, with the exception of specifically named job descriptions. During bargaining for a successor contract the Union demanded that the Employer include employees at the Fifth Avenue Mental Health Center (Center) in the bargaining unit. The Center was an existing psychiatric outpatient clinic that became a separate division of the Employer after the Employer purchased and assumed operation of the Center on or about May 5, 2003. The Center maintains separate operations, management, personnel and policies from NYANA. The Center's staff consists of approximately 25-30 psychiatrists, psychologists and therapists who are independent contractors, and an office staff consisting of one clerical worker and three medical receptionists.

After the Region dismissed a Section 8(a)(5) charge alleging that the Employer refused to bargain concerning the Center employees, finding that there was no statutory

accretion,[1] the Union filed a demand for arbitration "based on the broad language of the recognition clause, which includes all employees of NYANA except those specifically excluded. None of the titles at the Fifth Avenue Center, save the supervisors, are specifically excluded." The Employer then filed the instant charge, alleging that the Union's demand for arbitration over the Union's contention that the Center employees are covered by the terms of the parties' expired contract violates Section 8(b)(1)(A), (2) and (3).

We concluded that after the completion of the arbitration hearing and any post-hearing briefing, the Region would resubmit the matter with a recommendation as to whether the Union's arbitration demand was baseless and/or retaliatory under the tests set forth in Bill Johnson's[2] and BE & K,[3] and/or whether it sought an unlawful objective under Bill Johnson's. The arbitrator denied the Union's grievance by a decision dated November 7, 2005. The Union had argued in its brief to the arbitrator that, inter alia, the "Accretion" contract clause was a bargaining unit work preservation clause, and that NYANA violated that clause by hiring "independent contractor" clinical Center staff instead of considering the positions to be unit positions subject to the possible transfer in of working or laid-off unit employees. Further, the Union argued that by hiring clerical staff to whom NYANA did not extend the contract, NYANA violated the contract's recognition clause. The arbitrator's decision did not focus on the four clerical employees specifically and whether they should be in the unit, but focused more on the independent contractor clinical psychotherapy employees.

We conclude that there is insufficient evidence to prove that the Union was not reasonably based in its grievance claim that NYANA should be required to extend the contract to at least the clerical employees at the Center. Additionally, since there was no final Board determination that any Center employees were excluded from the bargaining unit, there is insufficient evidence to prove that the

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[1] The parties' contract contained an "Accretion" clause stating that "should NYANA bargaining unit members or employees perform bargaining unit work at any other facilities, locations or centers at any time during the term of [the] agreement, such employees shall be covered."

[2] Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983).

[3] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

Union's claim had an unlawful object. Accordingly, the charge should be dismissed, absent withdrawal.

The Board extends to arbitration proceedings the principle of Bill Johnson's, that a state court lawsuit may not be enjoined unless either: (1) the suit both lacks a reasonable basis in fact or law and is retaliatory; or (2) seeks an unlawful object.[4] The quantum of evidence required to demonstrate that a suit is reasonably based is small.[5] Here, at least as far as the clerical employees were concerned, we cannot say that the Union's claim was not reasonably based so as to preclude it from presenting that claim to an arbitrator. The clerical employees did fall within the literal language of the recognition clause, as they were performing work similar to that performed by clerical employees at other NYANA facilities. In addition, the Union presented evidence that one clerical employee transferred, albeit possibly with a break in service, from a unit facility to the Center. The arbitrator's "opinion" section of his decision finding no "accretion" focuses on the different job functions of the clinical psychotherapy employees at the Center, and not the job functions of the clerical employees. In these circumstances, there is insufficient evidence to prove that the Union's claim lacked a reasonable basis.[6] In any event, we agree with the

[4] See, e.g., Longshoremen Local 7 (Georgia-Pacific), 291 NLRB 89 (1988), enfd. 892 F.2d 130 (D.C. Cir. 1989) (policy favoring private resolution of labor disputes analogous to the states' interest in the maintenance of domestic peace and parallels the First Amendment concerns emphasized by the Supreme Court in Bill Johnson's); Elevator Constructors Local 3 (Long Elevator), 289 NLRB 1095 (1988) ("[b]ecause we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the presentation of the grievance coercive, notwithstanding the Supreme Court's decision in Bill Johnson's Restaurants v. NLRB . . .").

[5] See Beverly Health & Rehabilitation Services, 331 NLRB 960, 962 (2000), reconsideration denied 336 NLRB 332 (2001).

[6] See, e.g., Hotel and Restaurant Employees Local 274 (Warwick Caterers), 282 NLRB 939, 940-941 (1987), supplementing 269 NLRB 482 (1984) (no 8(b)(1)(A) violation where union sought to use a grievance to apply contract to employees the Board ultimately found the union did not represent; absent a prior contrary determination by the Board, it was not unreasonable for the union to try to have an arbitrator resolve the dispute). Cf. Teamsters Local 988 (Emery Worldwide), 303 NLRB 306 (1991), enf. denied and

Region that there is an insufficient basis to show that the Union pursued its claim with a retaliatory motive.[7]

Similarly, the Union's pursuit of its claim did not seek to contravene a Board decision or otherwise seek an unlawful object within the meaning of Bill Johnson's. While the Board has found that a union's attempt to enforce an arbitral award that was incompatible with a final Board representation decision sought an unlawful objective,[8] the Board has explicitly held that a Regional Director's dismissal of a Section 8(a)(5) charge seeking to include disputed employees in a unit, upheld on appeal as in the instant case, does not necessarily mean that a union's later attempt to achieve the same result through arbitration seeks an unlawful objective. HERE Local 274 (Warwick Caterers), 282 NLRB at 940. Here, where there was some small basis both in the contract language and factually for the Union's claim that the contract should be applied in some manner to the Center, there is insufficient evidence to prove that the Union's unsuccessful claim sought an unlawful object.

B.J.K.

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remanded sub nom. Emery Worldwide v. NLRB, 966 F.2d 1003 (5th Cir. 1992), on remand 309 NLRB 854 (1992) (Board found reasonable union's position that employees of a second company newly acquired by the employer had merged into the contractual unit and held lawful the union's attempt through arbitration to apply the contract to such employees; on remand, the Board accepted as law of the case the court's opposite conclusion that the attempt through arbitration to apply the contract to the second company's employees unlawfully sought to merge historically separate bargaining units).

[7] See generally Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 139-40 (1995)(timing of union's lawsuit shortly after unit rejected union representation "falls well short of establishing retaliatory motive").

[8] Teamsters Local 776 (Rite Aid), 305 NLRB 832, 935 (1991), enfd. 973 F.2d 230 (3d Cir. 1992).